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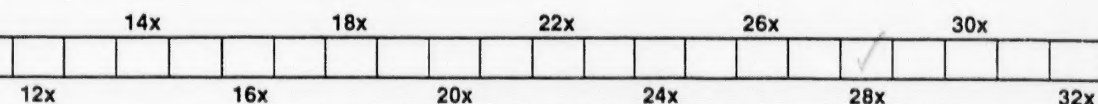
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*To His Excellency, The Right Honorable Edmund
Walker Head, Baronet, Governor General, &c., &c., &c.*

IN THE MATTER OF THE CLAIM OF THE HEIRS AND REPRESENTATIVES OF THE LATE HONORABLE SAMUEL HOLLAND TO A PORTION OF THE CHATEAU GARDEN, QUEBEC.

MAY IT PLEASE YOUR EXCELLENCY,

The undersigned has the honor to make the following
Report:

The claim of the heirs Holland is one of very grave importance, as well in respect of the value of the property in question, as of the principles of law and State policy involved in its decision. It has been from time to time pressed upon the Provincial Government, and occasionally upon the Imperial Government, for the last half a century. It has been taken up and considered by several Executive councils in Canada on various grounds, and has received conflicting decisions. It behoves the Government now finally to dispose of this claim in such a manner that the parties interested may not be harassed by continual further applications for a decision, nor the Government importuned by reiterated and endless petitions on the same ground of complaint. The *liasse* of papers or record in the case is a voluminous one, and I therefore think it advisable to submit a brief analysis of those documents in their chronological order for the purpose of facilitating its examination and discussion.

On the 10th November, 1764, the late Honorable Major General Holland, in his life time surveyor general of the then province of Quebec, petitioned his Excellency, James Murray, Governor General, for a grant of a small lot of "ground, sufficient for a house and garden situate on the street leading from the parade to Cape Diamond, adjoining the castle of St. Lewis on one side and the Battery on the other side, leaving room for the use of the Battery," as appears by the copy of a petition to be found among the papers.

On the 12th March, 1766, letters patent under the great seal issued, granting to Major Holland, his heirs and assigns for ever, in consideration of the rents and upon conditions therein mentioned, all that lot, piece or parcel of ground in the upper town of Quebec, near the castle of St. Lewis, and commonly called the Chateau Garden, in the said deed more particularly described with all and singular the hereditaments, messuages, houses and buildings thereon erected standing and being, and subject amongst other provisions and reservations to the following, viz.: Provided also, and reserving unto us, our heirs and successors, whenever ours or their service may require, our or their right of using the said lot of ground, with the messuages, houses and buildings thereon, for barracks or other uses, paying to him the said General Holland, his heirs, executors, administrators, or assigns, a reasonable price for any improvements, messuages, dwelling houses, and buildings which may happen to be made, erected, standing and being thereon.

On the 14th October, 1800, Major Holland made his last will and testament before Charles Voyer and his colleagues, public notaries at Quebec, wherein he declares that his immovable property consisted (amongst others) of a large lot of ground ("grand emplacement") near the castle of St. Lewis, granted to the testator and then cultivated as a garden, and he bequeaths the same to his wife, Maria Josette Rolet, and his children, John Frederick Holland, Charlotte Holland, Susannah Holland, Frederick Holland, and George Holland, in equal shares; and on the 25th October of the same year, by a codicil before the same notary and another, his colleague, he bequeathed to his said wife the usufruct during her life time of all his property mentioned in his said will, and he also substituted the two children of his deceased son Henry Holland to the said George Holland.

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On the 15th May, 1820, William Wilson of Quebec, waiter and searcher in H. M.'s Customs, purchased from the said Frederick (Braham) Holland, son and heir for one-fifth in the estate of the said Samuel Holland, one undivided fifth part of the said lot of ground called the lower Castle Garden for the sum of £500 currency, by deed before A. A. Parent and colleague, public notaries.

On the 17th March, 1837, William Phillips, J.P., John Phillips, master builder, and John Hughes, civil engineer and crown surveyor, all of Quebec, at the request of the said William Wilson and James Hastings Kerr, stating themselves to be agents and representatives of the said heirs, valued the said lot of ground, whereof the contents said to be per letters patent, 33,976 feet at three shillings and six pence per foot, making £6,829, 16s. currency.

On the 10th April, 1838, Sophia Sylvester Holland, one of the two children of the said Henry Holland and legatee under the said codicil of the 25th October, 1800, for one-half of a fifth of the estate of the said Samuel Holland, petitioned Her Majesty, praying that "a fair and adequate remuneration, according to the stipulations of this said grant may be made to her for her share and right in the said 'property'."

On the 12th May, 1838, Lord Glenelg, then Her Majesty's Principal Secretary of State for the Colonies, addressed a despatch (No. 37), to His Excellency the Earl of Durham, then Governor General, requesting him to enquire into the case, and if the Petitioner should be found to be equitably entitled to compensation, to estimate the amount, and report the fund from which it could most properly be defrayed.

On the 29th October, 1838, Lord Durham's council reported upon the Holland claim, and after a minute recapitulation of all the facts connected with this claim, and adverting to the circumstance of a tradition said to be very common in Quebec, namely, that General Haldimand (about 1780) wishing for the ground for a garden, offered Major Holland £800 for it, which the latter refused to accept, upon which General Haldimand declared that he would take it for the use of the works, and ordered a five gun battery to be constructed upon it, upon which tenure it has since been held, though about ninety nine parts out of one hundred of the superficial area have been appropriated to a kitchen and flower garden for the use of the chateau, the Committee estimating the ground at about £2,500, report that Miss Holland had an equitable claim for one-fifth of that amount. The report further states that "it appeared to the Committee that their uses" (mentioned in the grant) must be of the same nature as barracks, namely military;" and even supposing that some of the ground was wanted for the battery (of four guns) not the battery mentioned in and excepted from the grant, and taken *bona fide* on that account, still it is stated by the Engineer officers that a very considerable portion is not required for the battery. The Committee therefore think, that *the equitable claim of Miss Holland to compensation is clear*, and they do not see it would be right to fix the same at less than her one-fifth part of the whole lot. The Committee are of opinion however that it would have been better that the ground had not been granted, and they recommend that it should remain attached to the chateau, Miss Holland, and any other of the heirs releasing their respective claims as they receive compensation for them. The amount to be paid, the Committee recommend (as *the general use* of the ground has been for a garden to the chateau,) should be paid out of the funds of the Province, and not by the Ordnance Department.

On the 24th July, 1839, the Lords Commissioners of the Treasury addressed a letter to James Stephens, Esquire, Colonial Office, in answer to his of the 25th June, transmitting copy of Lord Glenelg's despatch to Lord Durham, with Miss Holland's Petition for compensation, and Sir I. Colborne's despatch with Report of Council by which he informs the Colonial Minister, that the information of Council respecting the value of the ground is insufficient and requiring a much more specific and formal valuation than that afforded by the Report of Council.

On the 31st July, 1839, the Marquis of Normanby, Colonial Secretary, addressed a despatch to Sir John Colborne, enclosing the letter from the Lords Commissioners of the Treasury, requesting such additional information as to the value of the property, as would enable them to come to a correct decision on the heirs Holland claim.

On the 6th September, 1839, the said William Wilson addressed a Petition to the Marquis of Normanby, setting forth his purchase of one-fifth of the Garden from F. B. Holland, and referring to his Petition of the 13th August, 1829, to Sir

James Kempt, praying restoration of his one-fifth, or an indemnity out of the waste lands of the Crown or otherwise, and representing that he had as yet no redress or compensation.

On the 11th October, 1839, Mr. James Hastings Kerr addressed a letter to the Clerk of the Executive Council, in which, adverting to the reference of the case, by the Colonial Minister back to the Provincial Government, he stating that he (Mr. K.) and Mr. Samuel Newton represented nine-tenths of the Holland Estate, and that they offer to furnish all the information necessary for the decision of their claims.

On the 26th October, 1839, the Executive Council reported on Mr. Wilson's Petition to the effect that the Commanding Royal Engineer should furnish a Map or Plan, shewing the extent of ground, and the proportion required for Battery, &c.

On the 19th December, 1839, Sir Charles O'Donnell, Military Secretary, transmitted to the Civil Secretary the Report of Colonel Oldfield, with a plan of the Chateau Garden made upon the Order in Council of the 26th October, 1839, stating the area to be 3 acres, 0 rods, 38 yards, 9½ feet, and representing that the whole garden being so intimately connected with the defences should be retained in the hands of the Government without the alienation of any part.

On the 27th January, 1840, W. S. Sewell, Sheriff of Quebec, reported by letter, to the Civil Secretary, the Declaration of William Wilson upon a Writ of Execution issued against him, that one-fifth of the Chateau Garden was his property and, as such, liable to be seized.

On the 9th March, 1840, Mr. Wilson addressed a letter to Mr. Poulett Thompson, Governor General, referring to a previous memorial of the 3rd March, 1840, and insisting upon the validity of his title which had been erroneously represented as bad.

On the 27th June, 1840, a Committee of the Executive Council reported that, referring particularly to the Report of the Commanding Engineer of the 18th December, then last, expressing a positive opinion that the whole Chateau Garden being so *intimately connected with the military defences* ought to be retained in the hands of Government, the Committee were then unable to report the quantum of compensation to be allowed to the Holland family, in as much as by the Report of the 29th October, 1838, it appeared that such part of the ground granted to Major Holland, as should be *bona fide* required for military purposes, should be kept in the hands of Government. The Committee, perceiving by the same Report that the Engineer Officer of that time stated that a very considerable portion of the Garden was not required for this Battery, find it necessary to ascertain from the military authorities the precise extent of the ground within the claim of the Holland family which may be required for *maintaining the BATTERY NOW EXISTING* there, and they recommend that a further Report be obtained in order to ascertain the precise extent of ground comprised within the claim of the Holland heirs.

On the 18th July, 1840, Colonel Oldfield, Commanding Royal Engineers, reported,

1. The whole area of the Garden to be 3 acres, 0 rods, 3 yards, 9½ feet.
2. The extent required for maintaining the existing Battery, 1 acre, 0 rods, 8 yards, 23½ feet.
3. His reasons for the retention of the whole area.
4. He reiterates his opinion that the whole garden or ground ought to be retained, and a plan of the premises accompanied the Report.

On the 25th July, 1840, the foregoing Report was transmitted by the Military Secretary to the Civil Government.

On the 5th August, 1840, a Committee of the whole Council, composed of Messrs. Steward, Cochrane, Pemberton, Daly, Sheppard, and Commissary General Routh, reported that it appeared by Colonel Oldfield's Report, that nearly the whole of the lot was essential to the defence of the town. They invoked the reservation of the grant as conferring a power to *resume possession* whenever the ground became necessary for military purposes, and that it is now actually in force. They also report that "something may perhaps still be urged to shew their claim to occupy that portion of the ground not immediately required, but which is described as a desirable acquisition for the defences. The value of such a claim for so temporary an occupation must be so very limited, if any can be established, that the Council, taking it into consideration, and the fact that the

"Holland family have never taken possession of any part of the Garden; that the Government, on the contrary, had possession of the ground during the lifetime of the original grantee, and that no claim appears to have been made by his heirs until 1820, the Committee cannot recommend that the claim for compensation should be further entertained by Her Majesty's Government."

On the 19th December, 1842, the then Executive Council reported that the Committee of that Council could add nothing to the facts reported as proved or surmised by the Executive Council of the Earl of Durham; that in their opinion the grant to Major Holland was a very improvident one unless this proviso for resumption for Barracks, or other uses, should be construed in the sense most favorable to the public. That the Report of Col. Oldfield, as to the connection of the locality with the defences of Quebec, and the necessity of retaining it for military purposes, establishes the case for resumption strictly; and considering that at a very early period the improvidence of the grant was asserted and the determination of the Government to withhold possession made known. That the ground was never used by the grantee for the purpose set out in the Petition; that no expenditure was made upon it by him, and that the claim was allowed to sleep for so long a period, the Committee fully concur in the Minute of Council of the 5th August, 1840, and do not recommend that the claim for compensation should be further entertained, but that if the Government do entertain the claim, there are no Provincial Funds from which it can be paid, but the same must be defrayed by Her Majesty's Ordinance.

On the 16th December, 1845, John Frederick Holland, in and by his will made at Prince Edward Island, and proved on the 8th December, 1848, bequeathed his grandson, Robert Barker, all his share in the Chateau Garden.

On the 22nd April, 1846, James G. Holland, widower, and sole representative of the late Frederick B. Holland, (son and heir of the late Major Holland,) and Charlotte Josette Holland, daughter of F. B. Holland, and next and sole representative of the late Charlotte Holland, daughter and heir of the said late Samuel Holland, sold to Henry A. P. Holland, their respective rights and shares in the Chateau Garden.

On the 29th August, 1846, William Wilson addressed a memorial to the Earl of Cathcart, Governor General, representing that the report of the Executive Council of the 5th August, 1840, is in perfect contradiction with that of the 29th October, 1838, *which latter established the claims of the heirs Holland*; he solicits a reconsideration of the claim, averring that so far from the Castle Garden being required for Military purposes, it had been given up to the corporation of Quebec for the use of the public, and praying that compensation be given by a grant of waste lands of the crown, which memorial was referred on the 4th September, 1846, to the Executive Council.

On the 21st September, 1846, the Executive Council of the Earl of Cathcart, composed of the Honorable Messrs. Morris, Draper, Papineau, and Smith, reported:

That they agree in the conclusion of the report of 5th August, 1840, that the claim for compensation should not be further entertained. They add that the original grantee, Major Holland, lived in Quebec until 1800, and does not appear to have made any improvement on the lot, although he might have done so before the arrival of General Haldimand, who took possession of the ground (whether forcibly or otherwise is immaterial to the present claim); that Major Holland does not appear to have complained, or to have asked for an indemnity. The Government have kept possession of it ever since the occupation of General Haldimand, they are at a loss to understand upon what ground the claims of the heirs Holland could be maintained, as it appears to have been by the committee of the Executive Council of the Earl of Durham, seeing the reservation in the original patent of the right of using the same lot of ground with the messuages, houses, and buildings thereon, whenever the public service should require it, for barracks or other uses, paying for buildings, &c. That these words clearly shew that the ground itself *could never be a matter of valuation nor give rise to any claim for indemnity in case of resumption*. They are therefore of opinion that until Mr. Wilson has proved that he or those in whose rights he applies have made improvements, and the value of them, his claim cannot be entertained, nor can he claim anything for any money he may have paid, as he must have been aware of the terms of the patent, and circumstances under which he now claims.

Among the papers of this case there is found a document purporting to be a copy of a deed of sale by Robert Barker, senior heir of John Frederick Holland, who was son and heir of the said Major Holland, to Pierre Blondin of the right and share of the said John Frederick Holland in the said Castle garden, by deed before Rousseau and colleague, public notaries, at St. Antoine de La Baie on the 11th November, 1848, which copy is not authenticated.

Among the said papers is also found a document purporting to be a notarial copy of a deed of sale by Pierre Blondin to Henry Augustus Prevost Holland, of the share acquired by the said Pierre Blondin in the said Castle garden, passed before Rousseau and colleague, public notaries, at St. Antoine de la Baie on the 13th November, 1848, but which document is not authenticated.

On the 11th January, 1849, a notice of the sale of a portion of the Chateau garden (9744 feet) was inserted in the Quebec Gazette, by authority, by Charles Secretan, junior, esquire.

On the 13th January, 1849, Mr. Penn, Ordnance secretary, addressed a letter to the respective officers at Montreal, giving communication of the said notice, and of the fact that the ground in question is the Governor's garden, in which are mounted iron ordnances for the defence of the place, and requesting them to adopt prompt measures to prevent the sale.

Upon the 21st January, 1849, a letter was addressed by the Military authorities to the Attorney General for Lower Canada, requesting him to take legal steps to prevent the disposal of the ground in question.

On the 22nd February, 1849, the respective officers inserted a notice in the Quebec Gazette by authority, referring to the foregoing advertisement of the 11th January, 1849, and denying all right in the representatives of the late Major Holland to the Castle garden, and they assert the rightful possession to be in the Ordnance department.

In the Gazette of the 15th March, 1849, an answer appeared to the communication upon the foregoing notice, and publishing the original letters patent to Major Holland.

On the 19th November, 1851, the Sheriff of the District of Quebec seized, in virtue of a writ of execution issued upon a judgment against the said William Wilson, in the cause of James Clearihue, Plaintiff, and William Wilson, Defendant, the undivided fifth part of the said Castle garden.

On the 19th March, 1852, the Attorney General for Lower Canada, filed an opposition to the said seizure, on the ground of the right of property, and the possession being in Her Majesty previous to, and at the time of the seizure.

On the same 19th March, 1852, the Attorney General also filed an Opposition *afin de distraire* in the same cause, claiming the right of property in the said fifth part of the said Castle Garden, seized under the said Writ, to be in Her Majesty, and praying that the same might be released from the said seizure, *distrait* and delivered over to Her Majesty.

On the 1st April, 1852, Henry Augustus Prevost Holland, was appointed Curator to the absentees, Susan Holland, Sophia Sylvester Holland, and Eliza Holland, by act of Curatelle, obtained from Mr. Circuit Judge Power at Quebec.

On the 13th August, 1852, William Wilson addressed a Petition to His Excellency the Earl of Elgin, Governor General, again setting forth:

The Patent to Major Holland, with a full description of the lot of ground.

Payment of the rent stipulated in the Patent.

The Will of Major Holland made on the 11th October, 1800, and a codicil thereto of the 25th October, 1800, bequeathing the said property to certain of his children and grand children.

The decease of Major Holland on the 28th December, 1801.

The sale by Frederick Braham Holland of his share to William Wilson.

That the use of a portion of the Garden as a Battery did not divest him or his co-proprietors of their right of property therein, and he prays:

For restoration of an undivided fifth part of such portion of the lot as is not used for military purposes.

On the 20th September, 1852, Henry Augustus Prevost Holland, as representing the heirs of the late John Frederick Holland, Josette Charlotte Holland, Susan Holland, Sophia Sylvester Holland, and Eliza Holland, the two last, children of the late Henry Holland, being all the heirs of the late Major Samuel Holland, addressed a Petition to his Excellency the Earl of Elgin, setting forth,

1. The grant to Major Holland, as appears by the original Patent annexed.
2. The meritorious military services of Major Holland which procured him this grant.
3. The payment of the rent stipulated.
4. The refusal of Major Holland to accept £800 in full compensation of his claim from General Haldimand, and the forcible possession taken by the latter in consequence of such refusal.
5. The reference of the Secretary of State for the Colonies of the memorial of one of the heirs, Holland, to the Earl of Durham, and the favorable Report of his Council thereon, but averring the value of the property as estimated by the Report (£2,500) as little more than one-third of the true value as estimated by Messrs. Phillips and John Hughes in 1837.
6. That this Report shews that Major Holland made efforts to secure his possession and that ninety-nine parts out of one hundred were used as a kitchen garden, and,
7. Praying for the quiet possession of this property, the Castle Garden, or reasonable compensation therefor.

On the 18th December, 1852, William Wilson made an affidavit before Oliver Fiset, Esquire, Justice of the Peace, to the effect that he was proprietor of one-fifth of the Garden. That he tendered the quit-rents for the whole lot to Mr. Receiver General Hale, who refused to accept them. That being in England after his acquisition of the said fifth, he memorialised the Government there in relation to the same, and to that memorial annexed a receipt for quit-rent on the fifth share, which, though repeatedly asked for, was never returned to him.

On the same day, 18th December, 1852, the said William Wilson made another affidavit before the same Justice to the effect that he (Deponent) was told at various times by Charles Grey Stewart, Esquire, that he (the latter) had been in possession of the Receipts for quit-rents on the Castle Garden in favour of Major Holland, which he delivered to the late Joseph Bouchette, Esquire, Surveyor General. That Deponent made frequent application for them without success and believes them to have been destroyed in the fire which consumed Mr. Bouchett's effects.

On the 21st January, 1853, the Honorable F. W. Primrose, Inspector General of the Queen's Domain, reported on the reference to him of the 19th August, 1852, that the transfer to William Wilson of one-fifth share in the property in question was legal and sufficient. That Wilson had furnished him with two affidavits respecting receipts for quit-rents, and also an acquittance for one year's quit-rent which Mr. P. returned to him before he (Wilson) went to England.

On the same day, 21st January, 1853, Mr. Primrose also reported on the reference to him of the Petition of W. A. P. Holland, to the same effect as his Report on the Petition of Wilson, adding a memorandum exhibiting the persons claiming to be the heirs of the late Samuel Holland, and the titles through which the Petitioner claims to represent the estate.

On the 11th April, 1853, the Superior Court at Quebec rendered judgment on the opposition *afin d'annuler* upon the default of the parties, Plaintiff and Defendant to contest the same, annulling the said seizure on the ground chiefly that at the time of the seizure the said property was not in the possession of the Defendant, but in the hands and possession of Her Majesty.

On the 11th April, 1853, the same Court rendered judgment on the opposition *afin de distraire*, upon the default of the said parties to contest the same, and ordered possession to be given up to Her Majesty.

On the 12th April, 1853, Mr. Anger, advocate, addressed a letter to Mr. Provincial Secretary Chauveau, requesting to be informed as to what progress had been made in the claim of the heirs Holland, which he had transmitted to the Government a year before.

On the 2nd December, 1856, Messrs. Lelievre and Angers, advocates, addressed a letter to Mr. Attorney General Cartier, soliciting his attention to the said claim of the heirs Holland.

GENERAL HEADS.

In order to arrive at a full and final determination of this claim, five points present themselves for consideration :—

- 1st.—The validity of the title.
- 2nd.—The effect of the reservation contained in it.
- 3rd.—In the event of the claim being admitted, and of the parties agreeing to surrender their rights for a compensation, the value of the area granted, and of its occupation by the Government since 1766.
- 4th.—The funds out of which such compensation is to be paid, whether out of the Imperial or Provincial Treasury, or partly out of one and partly out of the other.
- 5th.—The parties entitled to claim.

TITLE.

The first point to be taken up is obviously the validity of the original title or letters patent by General Murray to Major Holland. On this head it must be at once conceded, that however unwise or improvident it may be deemed, the validity of the grant does not appear ever to have been impugned; nor is there to be found any suggestion of fraud, misrepresentation, or other ground upon which it could be attempted to be set aside in a Court of Justice.

RESERVATION CLAUSE.

The second point, the effect of the reservation in the letters patent, is one not to be so readily or so easily disposed of as the first, but it is nevertheless perfectly susceptible of solution when dealt with on legal and just principles. The reservation is in the following words, viz.:— “ Provided also, and reserving unto us, our heirs and successors, *whenever our or their service may require*, our or their right of *using* the said lot of ground, with the messuages, houses, and buildings thereon, *for barracks or other uses*, paying to him the said Samuel Holland, his heirs, executors, administrators, or assigns, a reasonable price for any improvements, messuages, dwelling houses, and buildings which may happen to be made, erected, standing or being thereon.”

REPORTS OF COUNCIL.

On reference to the various Reports of Council on this claim, it will be found that the first was that of the Earl of Durham, on the 29th October, 1838, which enters fully and ably into the whole matter.

The next report of Council is that of the 26th October, 1839. The Committee of Council recommend, that in order to enable them to judge of the extent of the ground that may be necessary to serve for the Battery and other military purposes, the Commanding Royal Engineer be called upon for a survey and plan of the Garden, showing the extent of the grant and the locality of the Battery, and the exact quantity of the ground claimed by the Holland family which may be required for military purposes.

The Report of Council of the 27th June, 1840, after referring to the opinion of the Commanding Engineer of the 18th December, 1839, which was to the effect that the whole of the Garden *ought to be* retained and also to the Report of Council of the 29th October, 1838, containing the opinion of the Engineer Officers of that day that a very considerable portion of the Garden was not required for the Battery, declares that it was necessary to ascertain the precise extent of ground comprised within the claim of the Holland family, and they recommend a further Report on that head.

	Aeres.	Rods.	Perches.	Yards.
On the 18th July following, Colonel Oldfield reported the				
area claimed by the heirs, Holland, to be.....	1	2	34	11½
That required for maintaining the Battery.....	1	0	8	23½
Leaving an area claimable by the Holland Family of ...	0	2	25	18¼
equal to 28,725 superficial square feet.				

The next report of Council is that of the 5th August, 1840, made by the Honorable Messrs. Steward, Cochrane, Pemberton, Sheppard, Daly, and Com. General Routh. From the important bearing it has upon the case, and the subsequent allusion to it in the Reports of Council, it will be necessary to enter minutely into the facts assumed by it as having been established and the grounds and reasons of its adverse decision.

This claim was again brought under the consideration of Council on the 19th December, 1842. The Committee again recur to the improvidence of the grant, the determination of the Government to withhold possession, and to the fact that no expenditure had been made upon the lot by the grantee, and that the claim had been allowed to sleep for a long time, and they concur in the Minute of Council, of the 5th August, 1840, declaring that the claim for compensation should be no further entertained. They, however, conclude by stating that if Her Majesty's Government entertain the claim for compensation there are no Provincial Funds out of which remuneration could be made, and that, consequently, Her Majesty's Ordinance should pay the amount.

On the 21st September, 1846, the rights of the Holland Family were reconsidered by the Government upon the memorial of Mr. Wilson. The Committee of Council on that occasion declare that they agree in the Report of Council of the 5th August, 1840, on the grounds—that the original grantee lived in Quebec until the year 1800, without having made any improvement on the lot before General Haddimand took possession of it; that it is immaterial to the present claim whether he did so forcibly or otherwise; that Major Holland did not complain nor ask for an indemnity; that Government having kept possession ever since, they are at a loss to understand upon what ground the Earl of Durham's Council entertained the claim. They cite the terms of reservation, and they lay down as Law, that because, in the event of the Government using the said lot of ground with the messuages, &c., thereon for Barracks or other uses, an indemnity is stipulated to the grantee for the value of the buildings which might happen to be thereon; that it is clearly shewn that the ground itself could never be made a matter of valuation nor give rise to any claim for indemnity in case of resumption. That, therefore, until Mr. Wilson should have proved that he has made improvements, he has no claim.

O. C. IN FAVOR OF CLAIM.

It would appear then that the claim of the heirs, Holland, was entertained and fully entered into by the Council, of the Earl of Durham, and a decision come to on the 29th October, 1838, declaring it to be clearly established.

It is also evident by the terms of the orders in Council of the 26th October, 1839, and 27th June, 1840, that the demand was entertained and considered by the Governments of those days and received a quasi sanction from them inasmuch as they order a further report to be had from the military authorities for the purpose of ascertaining the precise extent of ground comprised within that claim.

O. C. ADVERSE AND GROUNDS.

The remaining Orders in Council are adverse to the claim and it is therefore necessary to review the grounds of their respective decisions, taking them up in their natural order and without more particular reference to each order in Council. They are as follows:—

- 1st.—The improvidence of the grant which was asserted at an early period.
- 2nd.—That the ground was never used by the grantee.
- 3rd.—That no buildings were erected, nor any improvements or expenditure made upon the lot.
- 4th.—That the parties have not proved any possession.
- 5th.—That the determination of the government to withhold possession was intimated at a very early period.

6th.—That the parties can have no remuneration unless for buildings, and that the terms of the reservation clearly shew that the ground could never be a matter of valuation, or give rise to indemnity if resumed, and that the claim cannot be entertained until they prove that they have made improvements.

7th.—That General Haldimand took possession (about 1780) and that the Government have kept possession ever since.

8th.—That Major Holland did not complain of this act of General Haldimand, nor claim any indemnity by reason of it.

9th.—That it is immaterial whether General Haldimand took possession forcibly or otherwise.

10th.—That no claim was made by the heirs Holland until 1826.

11th.—That a portion of the ground comprised within the Holland claim is required for maintaining the existing battery (of five guns placed there by General Haldimand), and that the whole Holland ground is so intimately connected with the defences, that it ought to be retained in the hands of the Government.

12th.—That the value of the portion not required for the battery is so very trivial, that coupled with the want of possession, no claim should be entertained.

13th.—That the necessity for retention for military purposes establishes a case for resumption, and that such right to resume possession under the reservation is now actually in force (1840).

14th.—That the reservation in the grant is to be construed in the sense most favorable to the public.

OPPOSITIONS BY ATTORNEY GENERAL.

In consequence of the seizure by the Sheriff of Quebec, of one undivided fifth part of the garden as belonging to William Wilson, the vendee of one of the heirs Holland, the Attorney General of Lower Canada, on the 19th March, 1852, at the request of the respective officers, filed two oppositions on the part of the Crown—one (*afin d'annuler*) to annul the said seizure on the ground that the right of property in this fifth share, and the possession was in Her Majesty; and another opposition (*afin de distraire*) to release and discharge the one-fifth part from the seizure, on the same grounds. Judgment was rendered in favor of the Crown on both oppositions, without at all adjudicating on the main question at issue, the opposants having been dismissed under a rule of court, founded on its established rules of practice, which enables parties opposant to obtain judgment on their oppositions in the default of all the parties to the cause to contest the same.

The opposition *afin d'annuler* was well founded, and would have annulled that seizure, even after a contestation, on the ground that the property was in the possession of Her Majesty, and was consequently seized *super non possedente*.

Had the opposition, which claimed the property as being in Her Majesty in right of Her Crown of the United Kingdom, been contested by pleading the patent, and the transfer to the Defendant, the judgment in my opinion would have adjudged the property to be in the heirs and representatives of Major Holland.

These judicial proceedings (though utterly insufficient in determining the present claim), are adverted to simply because a memorandum is to be found among the papers, making a reference to them.

Having already briefly referred to the various conflicting orders in Council on this matter, I will respectfully offer some observations on the ground and reasons advanced against the claim.

FACTS ADMITTED.

Among the preceding grounds of objection to the claim of the Holland family, there are various allegations of fact which may be assumed to be true, in as much as there does not appear to be any evidence to the contrary, namely:—

1st.—That the Government at an early period characterised the grant as improvident.

- 2nd.—That the ground was never used by the grantee
- 3rd.—That no expenditure was made upon it
- 4th.—That the parties have not had possession
- 5th.—That the Government at an early period expressed a determination to withhold possession
- 6th.—That General Haldimand took possession (about 1780), and that the Government have kept possession ever since
- 7th.—That Major Holland did not complain of the act of General Haldimand nor claim any indemnity, and
- 8th.—That no claim was made by the heirs until 1820

GENERAL OBSERVATIONS.

It is unnecessary to enter into a discussion upon most of these various objections, as they have obviously little or no bearing upon the question of title, and still less upon the equity of the claim, unless we except the fact of General Haldimand's having taken forcible possession of the ground, and that of the determination of Government to withhold possession ever since from the grantee and his heirs and assigns. These facts have a most significant bearing upon the merit of the case, and afford, but too forcible a refutation of many of the grounds put forth adversely to the claim.

Two of these grounds of objection, (Nos. 1 and 11) repeatedly invoked in the adverse reports of Council, and predicated upon mere matters of opinion may be easily disposed of. Every Government, and every public officer, civil and military, whose attention has been drawn to the consideration of this case, have been unanimous in declaring that the grant was a most improvident one; and also that the entire area of the Holland claim is so intimately connected with the defences of Quebec, that the whole *ought to be* retained in the hands of Government. They however have not deduced any consequence from such unanimity of a nature to throw additional light upon the subject, or to lead to the adoption of any principle calculated to bring about a legal or equitable adjustment of the case.

The report of the 5th August, 1840, invoked the reservation as a right to resume possession whenever the ground became necessary for military purposes, and as being then actually in force.

The reservation, that is "the right of using the said lot for barracks or other uses, *whenever Her Majesty's service should require it*," had always been in force since the date of the grant. A reference to it at this, or any other period, was purely a work of supererogation, and only exhibits a paucity of the reasons or grounds for resisting the claim. This report further goes on to say that the value of the claim to occupy that portion of the ground not immediately required for the defences (28,750 superficial square feet) being a claim for so temporary an occupation, if any can be established, that taking it into consideration, and the fact of want of possession, in the claimant's ancestors, the committee recommend that no further claim for compensation be allowed. It is impossible to accede to this reasoning, or to allow the decision based upon it, to have any weight in a just consideration of this claim. It is in other words determining that the claim of the Holland heirs, admitted to be equivalent to 28,750 superficial square feet, which it was difficult to get rid of, must be disallowed, because the claimants were not in possession, an advantage of which the Government had itself deprived them by military force.

Whenever a demand for the restoration of this property was made upon the Government, the first proceeding on such application ought to have been a reference to the law officer of the Crown, on the question of title, and to the military authorities to ascertain whether Her Majesty's service had "required," (in the terms of the reservation), that the garden or any portion of it should be used "by them for" barracks, or any other and what "uses," and whether, as a matter of fact, any and what extent of it had been so used or taken up for any such purpose, giving at the same time a clear and distinct statement of the particular use for which it had been so taken up, and the necessity or reasonable expediency of such "use" in a military point of view, in order to enable the Government, or a court of law, to determine whether such "use" or application of the ground was strictly

and legally, and *bona fide* within the true intent and meaning of the reservation. The uses as correctly interpreted by the Earl of Durham's council which indirectly impugns the *bona fides* of General Haldimand's act, must be "military uses." They must be based upon a justifiable or reasonable expediency, and cannot be borne out by any act emanating from the mere will or caprice of a military commander. It appears General Haldimand (in 1780) took possession of the garden *vi et armis*, by establishing a battery of five guns in rear of that previously existing upon the outward wall. If this be a "use" within the intent and meaning of the reservation, it is well; but it must be shewn and established upon principles of military or engineering science. If the additional battery be required for completing or perfecting the permanent defences of the town, it can easily be proved upon the known principles of the science of fortification.

The erroneous notions adopted by the various Governments which have pronounced adversely to the Holland heirs, have bequeathed a most embarrassing legacy to the Government of this day. It has, however, no other alternative now than to adhere to a course which will be in strict accordance with law and justice, and to face the consequences. In one report of Council it is laid down that the reservation must be interpreted in the sense most favorable to the public, a principle which must be interpreted, but which ought to have received its application in the present instance by regarding the public interests as being best subserved when the rights of the subject are truly respected, and the honor of the Crown faithfully sustained. A claim of right by the subject against the Sovereign is ever entitled to be treated with due consideration, and to be decided upon the same principle of law and equity by which it would be governed were it submitted to the arbitration of a court of law.

It is to the unjustifiable departure from these cardinal principles that are to be attributed all the errors and the injustice which have been committed in respect to this claim, and its present embarrassing position before the Government.

It is very much to be deplored that the several Governments which have refused to recognise this claim, should have done so somewhat prematurely, and without giving the subject a more profound consideration; and without adopting the obvious and plain course of procuring for their guidance the opinion of the law officers of the Crown, which would have placed this important point of departure upon these points, and in the manner which must have necessarily been indicated by the Crown lawyers, instead of applying their ingenuity to the coloring and distorting of facts in themselves valueless, and to the use of arguments not only of a most disingenuous character, but which are utterly irreconcilable with reason, law, and justice; and this palpably with the sole design of retrieving the blunder of an improvident grant. The act of General Haldimand was the first great mistake, and its want of prudence is the more reprehensible when it is considered that it was resorted to at a time when a disregard for the rights of colonists, and the exercise of a mere military domination had produced those baneful fruits on this continent which eventuated in administering a severe rebuke to the advisers of the system of Colonial Government of the day. I am not competent to offer an opinion upon the question whether the Battery established by General Haldimand was or was not actually required at the time for the "King's Service," and was or was not a *bona fide* military "use" within the scope of the reservation; but from the appearance of the thing itself, and from reliable information gleaned from persons supposed to be competent to judge, I have an abiding conviction that this act of General Haldimand was resorted to and has been invoked and adopted by several succeeding Governments for the sole purpose of defeating Major Holland and his heirs in their attempts to obtain possession, and that upon a calm consideration of all the circumstances connected with it, it cannot be otherwise characterised than as a most unworthy subterfuge.

The inconsistency of an objection predicated upon the want of possession in the claimants and upon the absence of any improvements or expenditure being made upon the ground, being found in juxta position with the assertion of the fact that "the Government at an early period had determined to withhold possession, and had always withheld possession," whereby the title of the claimants had become defensible; the reference to the assumed title value of "a claim for so temporary an occupation of the small quantity of ground which would be left to them after absorbing the greater portion for the maintenance of the Battery, if

"any such claim could be established, coupled" (says the Report,) "with the" (oft reiterated objection of) "want of possession;" the laying down as law "that the ground alone in the absence of buildings could never be a matter of valuation or give rise to indemnity if resumed," while it appeared by the Report of the Military Engineers that a portion only of the ground had been "resumed" leaving a residue to the heirs, however "trivial in amount it might be," and while the title of the heirs to the whole ground was founded upon the Letters Patent, constitute arguments of a character so repugnant in themselves, that it becomes a matter of regret that any Government should be counselled to descend to them, and the recourse to such reasoning as a rational ground for refusing to entertain the claim at all, savours much of the fabled aggression of a certain tyrannical denizen of the forest on his weaker neighbor, and his logic in justification of it.

The declaration "that it was immaterial whether General Haldimand took possession of the ground forcibly or otherwise" is evidence either of the amount of legal knowledge or of attention to the facts which presided at the deliberations on this case. *Spoliatus ante omnia restituendus* is a fundamental principle of law which admits of no exception or modification to enable any man to take advantage of his own wrong. The unauthorised and arbitrary act of the Sovereign himself is null in every country which is under the Government of Constitutional Law. *Ubi Rex non debet esse sub homine, sed sub Deo et Lege.*

With respect to the justice of this claim it is perfectly immaterial whether it be considered with reference to the whole extent of the ground or to the residue not required for the Battery, and whether this latter portion be supposed to be a hundred or a hundred thousand feet. The claim, were it only for one superficial foot of this garden, rested upon Letters Patent from the Crown, then as now, unimpeached and unimpeachable, and upon the honor of a British Sovereign whose destiny for centuries has been, and whose high mission still is to uphold the sceptre of Justice among the Nations of Europe, and whose fleets and armies would be speedily despatched to vindicate the rights of a subject in any quarter of the habitable globe were he treated with the like oppression and puny faith by any foreign potentate.

A retrospect of the present case presents a striking and a painful instance of the evils which are entailed by a departure from the straight course. The claimants have repeatedly prayed for an indemnity in wild lands of the Crown, and it is indubitable that their demands might have been long ago quieted without imposing any perceptible burden upon the Province by a grant of waste lands of less in quantity than a thousandth part of the many large blocks of land which have been heretofore conferred upon individuals with or without the shadow of a claim, and which, at the present day, are permitted grievously to impede the settlement of the country and the progress and prosperity of its inhabitants. When we contrast the wisdom of a course which would have recommended a distinct recognition of the Holland claim and the settlement at an early period by an indemnity of a moderate and acceptable amount of unproductive waste lands and forest trees with the folly of overriding the unexceptionable verdict of Lord Durham's Council and saddling the Province with a debt, the amount of which at this day reckoned upon the present value of the ground in dispute and of its use and occupation since 1766, calculated upon the principle of compound interest which usually governs Courts of Equity in similar matters, is almost inconceivable and would absorb more than a year's revenue of the Province. When we reflect upon the propriety and the justice of the course which a stern sense of duty would have dictated, and the fatuity and mischievous consequences of its opposite, we have exhibited a salutary and unfortunately a costly confirmation of the truth of the old adage that honesty is the best policy. The original grant was assuredly a most improvident one, but the repeated rejection of the claim founded upon it was infinitely more obnoxious to the charge of improvidence.

THIRD POINT.—VALUE.

With respect to the third point, the valuation of the claim, it need not be entered upon at this stage, further than to give a brief outline of the general items of which it is likely to consist, viz.:

1st.—The value of the entire area at the present day, or

2nd.—The value of the residue after deducting the quantity required for maintaining the battery of five guns, after a reference to the military authorities in the terms already mentioned, establishing satisfactorily that this or any other portion of the ground has been *bona fide* required, in the terms of the reservation, "for the King's service," and used for military purposes.

3rd.—The value of the use and occupation since 1766 of the whole lot, or of the residue, as the case may be, after the above reference.

FOURTH POINT.—FUNDS.

In the event of this claim being admitted, the fourth point, namely, the funds out of which the amount is to be defrayed becomes one of very grave importance. If any further argument were wanting to establish the vacillating policy and the absence of a correct appreciation of right and wrong which presided at the adverse determinations of this claim, it will be found in the concluding observation of the Report of Council of the 19th December, 1842, "That the Committee would further respectfully state that if Her Majesty's Government should see fit to entertain this claim for compensation, the ground being retained in Colonel Oldfield's report for purposes of defence, there are no provincial funds from which remuneration can be made, and consequently Her Majesty's Ordnance is the proper department from which only compensation can come." It is certainly somewhat difficult to understand upon what plea or principle it is, that Her Majesty's Ordnance, or in other words, the Imperial Treasury, should be called upon to make satisfaction to an inhabitant of this province for a claim which its own Government had declared to be inadmissible.

I assume, in the first instance, that the whole area granted is now the property of the heirs Holland, and I submit what in that case, according to my views, must be the principle upon which the indemnity or compensation is to be paid.

The Metropolitan Government, by its military authorities, have continuously held possession of the area of the Holland claim. I am of opinion therefore that the use and occupation of it ought to be defrayed out of the Imperial Treasury from the period 1766, to the date of the first order in council, (19th December, 1842,) made in this case after the change in the constitution, or rather in the practical administration of the government of the province.

Previously to this period, the inhabitants of this country exercised no adequate control over the acts of the Government, and ought not to be held answerable for any mal-administration by the representatives of the Crown, or his subordinates, civil or military. But on and after that date I consider that the Executive Council of this Province, possessing the full and uncontrolled administration of its local affairs, had the power and were bound to afford redress to any subject of the Queen within its limits, in a matter of this nature. Whatever then be the figure of the use and occupation subsequent to this date, whether of the whole area or of a residue, the Provincial treasury must bear the burden. With respect to the compensation for the value of the area it must be determined upon a similar principle. From 1837 to 1842 repeated applications were made by parties interested for an indemnity in money or lands and were as often rejected. This Report adopting the conclusion which the Executive Council of the 19th December, 1842, ought to have come to, namely, that the title of the heirs, Holland, to the lot of ground, mentioned in the Letters Patent, is indefeasible, it follows that the Government of that day ought to have restored the heirs Holland, to their rights or offered to indemnify them. The first application on the part of any of the heirs for an indemnity I find was on the tenth April, 1838, by the petition of Miss Sophia Sylvester Holland, heir for one-tenth. The value of the area, whatever its extent, on that day, must be ascertained, and as the acquisition of the property must be to the advantage of the Province, the amount must be paid out of the Provincial Treasury. In like manner its value on the 19th December, 1842, must be also obtained; and inasmuch as the Government of this Province for the reasons already given, was not vested with sufficient constitutional control over its local affairs during the period from 1838 to 1842, so as to enable it to settle this claim in such a manner as to bar its liability for the increasing value of the property, the excess of

the estimated value in 1842, over that in 1838, if any there be, must be borne by the Imperial Treasury. Next, the value of the property at the present day must be determined, and upon the same principle which I have laid down for the payment of the use and occupation after 1842, the increased value from the latter period to the present day must be paid by the Province.

RECAPITULATION OF LIABILITIES.

The figures used here are not to be supposed as intended to be even an approximation to the true amounts. They are merely arbitrarily adopted for the purpose of illustrating the principle of settlement herein proposed. They will in all probability be found to come short of the real amounts and not to bear the same relative proportions to each other.

	Imperial Gov't.	Provincial Gov't.
1766 } 72 years use and occupation during this period, to } say at £10 per annum, to be paid by the Impe- 1842 } rial Government.....	£760 0 0	
1842 } 15 years use and occupation, say at £20 per to } annum, to be paid by the Provincial Govern- 1857 } ment.....		£300 0 0
1838 Value of area to be paid by Provincial Gov- ernment		£2,500 0 0
1842 Value of area at this date.....	£4,000 0 0	
Do. in 1838 as above.....	2,500 0 0	
Increase to be paid by Imperial Government	£1,500 0 0	
	£1,500 0 0	
1857 Value of area at this date	6,000 0 0	
Do. in 1842.....	4,000 0 0	
Increase to be paid by Provincial Government	2,000 0 0	£2,000 0 0
To be paid by Imperial Govern- ment	2,260 0 0	
By Provincial Government.....		£4,800 0 0

FIRST PROCEEDING UNDER REPORT.

After your Excellency shall have considered the present Report, and in the event of its principle being adopted by the Government, in so far as the validity of the title, as the foundation of the claim, is concerned, the next proceeding must be a reference to the military authorities to ascertain whether the area of the Holland claim, or any part of it, has in the terms of the reservation in the patent been "required for Her Majesty's service," and used for barracks or other and what military purposes. This reference must be framed in such clear and definite terms that the officers of Her Majesty's engineers may distinctly understand what is required of them, and that they will see that the matter is not handed over to them, as there is too much reason to believe it has been heretofore, with a view to make a case against the claimants, but solely for the purpose of placing the Government in a position to determine whether the military government has been obliged by the exigencies of the public service, to avail themselves of the privileges reserved to the crown,—a case which must be made out on principles of engineering or military science in such a manner as would enable a court of justice to decide whether it be legally within the scope of the reservation or not.

FIFTH POINT.—PARTIES ENTITLED TO CLAIM.

Simultaneously with the last proceeding measures must be adopted for the purpose of ascertaining who are the heirs now living, of the late Major Holland, and of opening negotiations with the parties to whom some of them may have transferred their rights. No conclusion can however be come to with the heirs or assigns, *until a final settlement be agreed upon with all*. As regards the parties who may have acquired those rights, they may be summarily and unceremoniously dealt with, as in all probability they have purchased them for a sum or consideration greatly disproportionate to the real value. Should they therefore be indisposed to come to reasonable terms, their claims may be resisted by the rightful heirs on the principle of the law of Lower Canada, designated *Lesion d'outré moitié*, (a sale of land for a price less than half its true value) founded upon the Roman law, and analogous to that of England, which favors a rescission of such contracts on the ground of the inadequacy of the price which may amount, according to the circumstances of the case, to be a violent presumption of fraud. The heirs have the best claim upon the Government for the substantial portion of the indemnity, and ought to be equitably and liberally dealt with, unless indeed, "sick with hope deferred," they have all passed to another "bourne." The honor of the Government must now be vindicated by a just and reasonable settlement with the surviving descendants of the late Major Holland, if any be found, and with all others whose rights they are willing to recognise. Both must be fairly and at the same time cautiously met. The circumstances of this case afford a sufficiently ample margin for negotiation in such a manner as to prevent the Government being over-reached by any extravagant pretensions on the part of any one of the parties. The really improvident nature of the grant, the omission of their ancestors to urge their claim in such a way as to base it on a solid foundation, and to press a strong case upon the Government, and in a word their omission to do that which, if the principles of the present report be approved, this Government will have done for them, may be fairly urged against an exorbitant demand. Without having in the least impaired the validity of their title, or the equity of their claim, they have assuredly been negligent in sustaining it. Had they pursued a skilful and resolute course, the Governments which have decided against them might have been compelled to succumb, and to adjust this claim on equitable terms, which would have exempted the Government of the present day from a difficult and embarrassing position. All these considerations afford justifiable grounds of argument in favor as well of an immediate recognition of their claim, as of restraining the claimants within moderate bounds. It must however be in fairness admitted that they have been "more sinned against than sinning."

Their acquiescing now in a just settlement, and the effecting of such a compromise as may be fulfilled without impairing the honor of the Crown, and without detriment to the public interests, must obviously much depend upon the prudence with which the negotiations are conducted.

I have thus respectfully submitted my views as well upon the law as upon the equity of this case in terms which may be deemed too emphatic for the tone of an ordinary official report, but feeling that it was one of an unusual character, involving the honor of the Crown, and the character of the Government to which I belong, whose policy I am bound to sustain, and must be prepared to justify, I should hold it to be a dereliction were I to suffer the opinion which I conscientiously entertain to be disguised or feebly enunciated, or the merits of a just cause to be impaired by a too punctillious adherence to the old stereotyped phraseology and propriety of a formal law report.

COMMUNICATION TO IMPERIAL GOVERNMENT.

But in the event of the Government (as already stated) entertaining this claim and concurring in this Report so far as to admit a necessity for its liquidation, and the obligation of the Imperial Government to bear some portion of the burden, I respectfully submit that before any proceeding whatever be adopted evidencing such determination, a communication must be made to the Imperial

authorities by transmitting either a copy of this report or of such order in council as may alter or modify it, with a view to obtain their assent to the law of the case, and the portion of the indemnity to be paid by the two Governments respectively as herein suggested, and in the event of their entertaining a difference of opinion upon either point, that they may favor the Government of Canada with their view of the law and principle of adjustment.

All which is respectfully submitted.

I have the honor to be,

&c. &c. &c.

DUNBAR ROSS.